



October 15, 2001

Mr. William M. Buechler  
Buechler & Associates  
814 San Jacinto Boulevard, Suite 408  
Austin, Texas 78701-2404

OR2001-4658

Dear Mr. Buechler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153334.

The Northwest Independent School District (the "district"), which you represent, received a request for the following information:

[A]ll pay request and hours worked forms completed by Caroline Frusha[.]

[T]he visitor's sign in sheets for 7 Hills Elementary school during the 1999/2000 school year[.]

[L]ong distance phone records made from 7 Hills Elementary school during the 1999/2000 school year[.]

District generated documents indicating the date when [a named student] was unenrolled[.]

[A]ll itemized vouchers and requests for payments made to the District by attorneys for Special Education issues between the years of 1998-2001[.]

[T]he May 2001 ARD tapes along with any transcripts that have been made and paid for by the District.

You inform this office that the requested long-distance phone records do not exist. You state that other requested information will be provided, if it exists. Chapter 552 of the Government Code does not require a governmental body to make available information that does not exist or to prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 362 at 2 (1983). You claim that other

responsive information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the representative samples of information you submitted.<sup>1</sup> We also received comments from the requestor. See Gov't Code § 552.304 (providing that any interested person may submit comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that the documents submitted by the requestor contain a prior request for information addressed to the district. The requestor's letter dated March 7, 2000 to Mr. David Collyer, Northwest ISD Special Services, states in part:

Pursuant to the Open Records Act, please send me a copy of any records generated by [a named individual] that reference my son or my family. Please also send me, pursuant to the Open Records Act, a copy of the "private file" which you maintained on our son.

To the extent that the district is in possession of or has access to information that is responsive to these requests, we assume that the district has released that information. If not, then the district must do so at this time. See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

With respect to the present request for information, you state that "the request for the ARD tapes and transcripts was addressed in the parties' Joint Status Report and the parties agreed that those would be requested through the Discovery process." You have provided a copy of the status report, which recites that "Plaintiff, at Defendant's request, will serve a discovery demand directed to such transcripts" of audiotapes of ARD meetings. This stipulation regarding discovery does not excuse the district from responding to this request for the ARD tapes and transcripts under chapter 552 of the Government Code. See Gov't Code § 552.006; Open Records Decision No. 551 at 4 (1990) (distinguishing between respective purposes and functions of the discovery process and chapter 552). As the district does not request a decision with respect to the ARD tapes and transcripts, that information must be released. See Gov't Code §§ 552.301, .302; ORD 664.

We next note that most of the submitted information comes within the scope of section 552.022 of the Government Code. Section 552.022 provides that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

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<sup>1</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the district to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16) (emphasis added). We have marked the documents that are subject to section 552.022(a)(3) and (16). The district must release these documents, unless they contain information that is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body).

We note, however, that the names of students appear in the documents that are subject to section 552.022. The federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

You redacted portions of some of the submitted documents. We assume that you did so in accordance with Open Records Decision No. 634 (1995). You do not inform this office that the district has authority under FERPA to release the student-identifying information that appears in other submitted documents. The district must not disclose any information that is confidential under FERPA, unless the district has authority to release that information under the federal law. We note that FERPA gives a parent the right to inspect and review the education records of his or her child. *See* 20 U.S.C. § 1232g(a)(1)(A).

Lastly, we consider your claim under section 552.103 of the Government Code with regard to the remaining information at issue. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 bears the burden of providing relevant facts and documents sufficient to establish that this exception is applicable to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be withheld under this exception. *Id.*

You inform this office that the remaining information relates to pending litigation to which the district is a party. You have provided a copy of the plaintiff's complaint in the litigation. You indicate, and the complaint confirms, that this litigation was pending when this request for information was received. We find that the remaining information relates to the litigation. We therefore conclude that the district may withhold the remaining information at this time under section 552.103.

In reaching this conclusion under section 552.103, we assume that the district does not seek to withhold any information that the opposing parties to the litigation have seen or to which they have had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties to the litigation have seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, any information that is confidential by law must not be released, even at the conclusion of the litigation. *See* Gov't Code §§ 552.007, .101, .352.

In summary, the district must release the documents that are subject to section 552.022 of the Government Code. In doing so, however, the district must not disclose any student-identifying information that is made confidential under FERPA, unless the district has authority to release that information under the federal law. The district may withhold the remaining information at this time under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If

the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

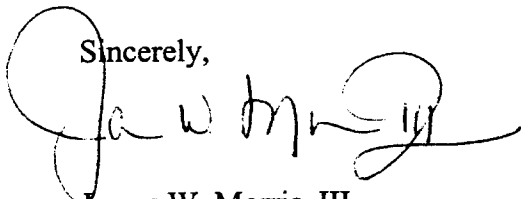
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 153334

Enc: Submitted documents

c: Ms. Debbie Mincey  
526 Oak Hills Drive  
Newark, Texas 76071  
(w/o enclosures)